STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 12, 2001
v	No. 225113 Kent Circuit Court
DANIEL JAY TOMPKINS, Defendant-Appellant.	LC No. 98-011126-FH

Before: Holbrook, Jr., P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction for second-degree criminal sexual conduct (CSC), MCL 750.520c(1)(a) [sexual contact with a person under the age of thirteen]. Defendant was sentenced to three to fifteen years' imprisonment. We affirm.

On appeal, defendant first argues that the trial court erred in admitting the other acts testimony of one witness because the prosecutor did not give proper notice of such intent under MRE 404(b)(2). We disagree. The admissibility of other acts evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

MRE 404(b)(2) requires the prosecutor to provide notice before trial or, on good cause shown, during trial, of the nature of other acts evidence intended to be introduced and the rationale for admitting such evidence. In this case, the prosecutor did not comply with MRE 404(b)(2) with regard to the particular witness testimony at issue. In such instances, the trial court has discretion to fashion the appropriate remedy, with suppression being appropriate "only in the most egregious cases." *People v Clark*, 164 Mich App 224, 229-230; 416 NW2d 390 (1987), quoting *People v Taylor*, 159 Mich App 468, 487; 406 NW2d 859 (1987). Here, the trial court denied any remedy, holding that no prejudice resulted to defendant because the witness had been endorsed, the witness's statement to police was provided to defendant, and defendant properly anticipated the rationale for admissibility. On the basis of the trial court's reasoning, and consistent with the purpose of the notice requirement, we cannot conclude that the trial court abused its discretion in admitting the other acts testimony despite the failure to conform to MRE 404(b)(2). See *People v VanderVliet*, 444 Mich 52, 89, n 51; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994); *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

Further, even if the trial court abused its discretion, the admission of the evidence was harmless because the trial court articulated on the record that its guilty verdict was premised primarily on the victim's testimony.

Defendant also argues that the trial court reversibly erred in admitting other acts testimony of the victim and three other witnesses contrary to MCR 404(b). We disagree. Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if the evidence is "(1) offered for a proper purpose and not to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh danger of unfair prejudice, MRE 403." *People v Ho*, 231 Mich App 178, 185-186; 585 NW2d 357 (1998).

Defendant first claims that the victim was improperly permitted to testify that defendant had masturbated in her presence at some unspecified time while she attended day care at defendant's home. Because defendant did not object to this testimony at trial, the issue is forfeited unless plain error is established. See MRE 103(a)(1); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). In this instance, even if we concluded that the disputed testimony was inadmissible, defendant failed to establish the requisite prejudice resulting from such error in light of the untainted evidence in support of his conviction. See *Carines*, *supra* at 763-764. Further, reversal would not be warranted because we are not persuaded that the error resulted in the conviction of an innocent defendant or that it seriously affected the fairness, integrity, or public reputation of judicial proceedings. See *Id*. at 763.

Defendant also claims that testimony from two other day care attendees regarding defendant's allegedly inappropriate past conduct, including walking around in his underwear, leaving the bathroom door open while he urinated, exposing and touching his penis, and rubbing his penis on one of their "backsides," was improperly admitted. At trial defendant objected to the testimony; however, reversal is only warranted if the trial court abused its discretion and such error was not harmless. See *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

Review of the record reveals that the trial court admitted the contested testimony after observing that CSC cases are unique and finding that the testimony was logically relevant based on the "doctrine of chances" theory. First, our Supreme Court has rejected the "lustful disposition" rule "which allows the use of other acts for propensity purposes in sex offense cases." *People v Sabin (After Remand)*, 463 Mich 43, 60-61; 614 NW2d 888 (2000). Second, the "doctrine of chances" is inapplicable because whether defendant touched the victim accidentally or with an innocent intent was not in issue. See *Crawford*, *supra* at 392-394; *VanderVliet*, *supra* at 79.

Further, our review leads us to conclude that the contested testimony, apparently offered to establish opportunity or common plan, was not logically relevant to an element of the charged offense. See *Sabin (After Remand)*, *supra* at 66-67; *Ullah*, *supra* at 675. However, because the trial court articulated on the record that its guilty verdict was premised primarily on the victim's testimony, after deeming defendant's testimony incredible, such erroneous admission constituted harmless error.

Defendant also challenges the admission of the victim's school counselor's testimony on both MRE 404(b) and hearsay grounds. However, the challenged testimony was not other acts testimony; therefore, defendant's first argument is without merit. See MRE 404(b). Further, the challenged testimony was not hearsay because it was not offered for its truth but rather to rebut defendant's argument that the counselor encouraged the victim to fabricate the accusations against him. Accordingly, the testimony was properly admitted.

Next, defendant argues that the evidence was insufficient to support his conviction because his alleged conduct did not fall within the scope of MCL 750.520c(1)(a). In particular, defendant claims that intentionally touching the victim's face with his penis did not constitute sexual contact. We disagree. Whether a defendant's alleged conduct falls within the scope of a criminal statute is a question of law that is reviewed de novo. *People v Thomas*, 438 Mich 448, 452; 475 NW2d 288 (1991); *People v Hammons*, 210 Mich App 554, 557; 534 NW2d 183 (1995).

"Sexual contact" for purposes of CSC offenses is defined as including:

> the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification. [MCL 750.520a(k).]

Statutes that are clear and unambiguous must be enforced as written. *People v Venticinque*, 459 Mich 90, 99-100; 586 NW2d 732 (1998). In this case, the statute clearly prohibited defendant's conduct, i.e., the intentional touching of defendant's penis to the victim's face. Further, any other construction would lead to an absurd and illogical result. See *People v Noble*, 238 Mich App 647, 659; 608 NW2d 123 (1999). Accordingly, the evidence was sufficient to support defendant's conviction.[1]

Finally, we reject defendant's argument that the cumulative effect of trial errors deprived him a fair trial because none of defendant's claims of error are meritorious. See *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter

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[1] The issue whether the touching could "reasonably be construed as being for the purpose of sexual arousal or gratification" was not raised on appeal.